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Copyright Royalty Board

37 CFR Part 385

[Docket No. 21-CRB-0001-PR (2023-2027)]

Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV)

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Proposed rule.

SUMMARY: The Copyright Royalty Judges publish for comment proposed regulations that set rates and terms applicable during the period beginning January 1, 2023, and ending December 31, 2027, for the section 115 statutory license for making and distributing certain configurations of phonorecords of nondramatic musical works.

DATES: Comments and objections, if any, are due no later than [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may send comments, identified by docket number 21-CRB-0001-PR (2023-2027), by filing online through eCRB at <https://app.crb.gov>.

Instructions: To send your comment through eCRB, if you don't have a user account, you will first need to register for an account and wait for your registration to be approved. Approval of user accounts is only available during business hours. Once you have an approved account, you can only sign in and file your comment after setting up multi-factor authentication, which can be done at any time of day. All comments must include the Copyright Royalty Board name and the docket number for this proposed rule. All properly filed comments will appear without change in eCRB at <https://app.crb.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to eCRB at <https://app.crb.gov> and perform a case search for docket 21-CRB-0001-PR (2023-2027).

FOR FURTHER INFORMATION CONTACT: Anita Brown, CRB Program Specialist, at 202-707-7658 or crb@loc.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 115 of the Copyright Act, title 17 of the United States Code, requires a copyright owner of a nondramatic musical work to grant a license (also known as the “mechanical” compulsory license) to any person who wants to make and distribute phonorecords of that work, provided that the copyright owner has allowed phonorecords of the work to be produced and distributed, and that the licensee complies with the statute and regulations. In addition to the production or distribution of physical phonorecords (compact discs, vinyl, cassette tapes, and the like), section 115 applies to digital transmissions of phonorecords, including permanent digital downloads and ringtones.

Chapter 8 of the Copyright Act requires the Copyright Royalty Judges (Judges) to conduct proceedings every five years to determine the rates and terms for the section 115 license. 17 U.S.C. 801(b)(1), 804(b)(4). Accordingly, the Judges commenced the current proceeding in January 2021, by publishing notice of the commencement and soliciting petitions to participate from interested parties. *See* 86 FR 25 (Jan. 5, 2021).

The Judges received petitions to participate in the current proceeding from Amazon.com Services LLC, Apple Inc., Copyright Owners (joint petitioners Nashville Songwriters Association International (NSAI) and National Music Publishers’ Association (NMPA)), Google LLC, George Johnson, Joint Record Company Participants (filed by Recording Industry Association of America, Inc. for joint petitioners Sony Music Entertainment, UMG Recordings, Inc., and Warner Music Group

Corp.), Pandora Media, LLC, David Powell, SoundCloud Operations Inc.,¹ Spotify USA Inc., and Brian Zisk.²

The Judges gave notice to all participants of the three-month negotiation period required by 17 U.S.C. 803(b)(3) and directed that, if the participants were unable to negotiate a settlement, they should submit Written Direct Statements no later than September 10, 2021. On May 25, 2021, the Judges received a motion stating that several participants³ had reached a partial settlement regarding the rates and terms for the period commencing in January 2023 under Section 115 of the Copyright Act, namely, the applicable rates for use of musical works in physical phonorecords, permanent downloads, ringtones, and music bundles (Subpart B Configurations)⁴ and seeking approval of that partial settlement. *See Motion to Adopt Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations*, Docket No. 21-CRB-0001-PR (2023-2027) at 1 (May 25, 2021). The Judges published for comment a proposed rule and received comments in opposition to the settlement from twelve interested parties, including joint comments from organizations, trade associations, and self-assembled groups of parties.⁵ *See* 86 FR 33601 (June 25, 2021), 86 FR 40793 (Jul. 29, 2021) (reopening comment period), 86 FR 58626 (Oct. 22, 2021) (reopening comment period a second time).

After considering the comments in opposition to the settlement, the Judges withdrew the proposed rule that would have adopted that settlement as statutory royalty

¹ SoundCloud Operations Inc. withdrew from the proceeding on May 21, 2021.

² David Powell and Brian Zisk filed petitions to participate in this proceeding; neither filed a Written Direct Statement.

³ The participants who filed the motion are the “Copyright Owners” (NMPA and NSAI) and the “Record Company Participants” (Sony Music Entertainment, UMG Recordings, Inc. and Warner Music Group Corp.). Motion at 1.

⁴ Subpart B refers to subpart B, part 385, subchapter E, chapter III, 37 CFR, the regulations detailing royalty rates and terms for licensing musical works under the provisions of 17 U.S.C 115 (Copyright Act).

⁵ One participant in the proceeding, George Johnson d/b/a GEO Music, objected to the settlement. Other parties opposing adoption of the settlement as a basis for statutory rates and terms included songwriters, publishers, music industry attorneys, and trade associations.

rates. *See* Proposed rule; withdrawal; Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), 87 FR 18342 (Mar. 30, 2022).

On May 5, 2022, the Judges received a Joint Motion to Adopt New Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations (Motion). The moving parties are self-identified Copyright Owners and self-identified Record Company Participants.⁶ The full text of the Motion is available on eCRB (<https://app.crb.gov>).⁷

On May 19, 2022, George Johnson d/b/a/ GEO, filed a response in opposition to the Motion.⁸

The settlement proposes that the section 115 royalty rate for subpart B configurations for the rate period commencing January 1, 2023, be set at \$0.12 per track, with annual inflation-based adjustments for subsequent years of the rate period. Motion at 3. The Moving Parties proposed editorial and substantive changes to applicable regulations found in both subparts A and B of part 385 to accomplish the rate increase.

The proposed editorial changes apply to two definitions in subpart A and would clarify the reach and application of the terms “Licensed Activity,” and “Sound Recording Company.” The substantive changes occur in secs. 385.10 and 385.11, which state the proposed rate for 2023 and describe the proposed annual inflation-based rate adjustment for subsequent years. The Moving Parties provided a redlined version of the regulations and the proposed changes thereto, along with the stated rationale for each change. Motion at 6-7.

⁶ The composition of the moving parties is the same as in the original motion filed in May 2021.

⁷ The Motion stated that the Moving Parties had previously separately entered into a memorandum of understanding (MOU) addressing certain negotiated licensing processes and late fee waivers but that the MOU was “not consideration” for any of the terms of the current settlement. *See* Motion at 4 n. 2; 6. (<https://app.crb.gov/document/download/26619>). The Moving Parties contend that predecessor agreements to the MOU, some or all of which may be incorporated by reference in the current MOU, are publicly available online at <http://nmpalatefeesettlement.com/>.

⁸ In general, the Judges do not receive pleadings in opposition to a motion that triggers publication of notice, such as the Motion at issue here. Nonetheless, the Judges received and considered GEO’s timely opposition. The Judges will not consider that opposition as a formal comment as required by publication in the *Federal Register*. The Moving Parties communicated to the Judges that no reply is forthcoming.

As part of this proposed rule, the Judges propose an additional minor revision to the definition of “Eligible Digital Download” in section 385.2. The cross-reference to 17 USC 115(c)(3)(C) and (D) in that definition is shortened to 17 USC 115 because, following enactment of the Music Modernization Act, the section no longer has a subsection (c)(3). *See* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Public Law 115-264, 132 Stat. 3678, 3679-3684 (October 11, 2018).

Section 801(b)(7)(A) of the Copyright Act authorizes the Judges to adopt rates and terms negotiated by “some or all of the participants in a proceeding at any time during the proceeding” provided they are submitted to the Judges for approval. This section provides that the Judges shall provide notice and an opportunity to comment on the agreement to (1) those that would be bound by the terms, rates, or other determination set by the agreement and (2) participants in the proceeding that would be bound by the terms, rates, or other determination set by the agreement. *See* sec. 801(b)(7)(A). The Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants not party to the agreement if any *participant* objects and the Judges conclude that the agreement does not provide a reasonable basis for setting statutory terms or rates. *Id.*

If the Judges adopt rates and terms reached pursuant to a negotiated settlement, those rates and terms are binding on all copyright owners of musical works and those using the musical works in the activities described in the proposed regulations.

The Judges solicit comments on whether they should adopt the proposed regulations as statutory rates and terms relating to the making and distribution of physical or digital phonorecords of nondramatic musical works encompassed in subpart B, part 385 of the applicable regulations.

Comments and objections regarding the rates and terms and the revisions to the regulations proposed by the Moving Parties and the Judges must be submitted no later

than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

List of Subjects in 37 CFR Part 385

Copyright, Phonorecords, Recordings.

Proposed Regulations

For the reasons set forth in the preamble, the Copyright Royalty Judges propose to amend 37 CFR part 385 as follows:

PART 385— RATES AND TERMS FOR USE OF NONDRAMATIC MUSICAL WORKS IN THE MAKING AND DISTRIBUTING OF PHYSICAL AND DIGITAL PHONORECORDS

1. The authority citation for part 385 continues to read as follows:

Authority: 17 U.S.C. 115, 801(b)(1), 804(b)(4).

2. In § 385.2 revise the introductory text of the definition for “*Eligible Limited Download*”, the definition for “*Licensed Activity*”, and the fourth sentence in the definition for *Sound Recording Company* to read as follows:

§ 385.2 Definitions.

* * * * *

Eligible Limited Download means a transmission of a sound recording embodying a musical work to an End User of a digital phonorecord under 17 U.S.C. 115 that results in a Digital Phonorecord Delivery of that sound recording that is only accessible for listening for—

* * * * *

Licensed Activity, as the term is used in subparts C and D of this part, means delivery of musical works, under voluntary or statutory license, via Digital Phonorecord Deliveries in connection with Interactive Eligible Streams, Eligible Limited Downloads, Limited Offerings, mixed Bundles, and Locker Services.

* * * * *

Sound Recording Company means a person or entity that:

* * * * *

(4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of a person identified in paragraphs (1) through (3) of this section.

3. Revise § 385.10 to read as follows:

§ 385.10 Scope.

This subpart establishes rates and terms of royalty payments for making and distributing physical phonorecords, Permanent Downloads, Ringtones, and Music Bundles, in accordance with the provisions of 17 U.S.C. 115.

4. Revise § 385.11 paragraph (a) to read as follows:

§ 385.11 Royalty rates.

(a) Physical phonorecords and Permanent Downloads.

(1) *2023 Rate.* For the year 2023, for every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either 12.0 cents or 2.31 cents per minute of playing time or fraction thereof, whichever amount is larger.

(2) *Annual rate adjustment.* The Copyright Royalty Judges shall adjust the royalty rates in paragraph (a)(1) of this section each year to reflect any changes occurring in the cost of living as determined by the most recent Consumer Price Index for All Urban Consumers (U.S. City Average, all items) (CPI-U) published by the Secretary of Labor before December 1 of the preceding year. The calculation of the rate for each year shall be cumulative based on a calculation of the percentage increase in the CPI-U from

the CPI-U published in November, 2022 (the Base Rate) and shall be made according to the following formulas: for the per-work rate, $(1 + (Cy - \text{Base Rate}) / \text{Base Rate}) \times 12\text{¢}$, rounded to the nearest tenth of a cent; for the per-minute rate, $(1 + (Cy - \text{Base Rate}) / \text{Base Rate}) \times 2.31\text{¢}$, rounded to the nearest hundredth of a cent; where Cy is the CPI-U published by the Secretary of Labor before December 1 of the preceding year. The Judges shall publish notice of the adjusted fees in the *Federal Register* at least 25 days before January 1. The adjusted fees shall be effective on January 1.

* * * * *

Dated: May 24, 2022.

Suzanne M. Barnett

Chief Copyright Royalty Judge.

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